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No. 95-1765

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

DAN CHASE TAXIDERMY SUPPLY COMPANY, INC. and DAN CHASE,

Petitioners,

against

SUPERIOR FORM BUILDERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE ARCHIE PHILLIPS, ET AL. IN OPPOSITION TO THE PETITION

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CONSENT OF THE PARTIES

Counsel of record for petitioners and respondents in this action have consented to the filing of this amici brief and their written consent is filed concurrently herewith.

QUESTIONS PRESENTED

Amici adopt the Questions Presented set forth in the petitions for Writ of Certiorari.

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OTHER AUTHORITY:

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DESCRIPTION OF INTEREST OF AMICI CURIAE

Archie Phillips, Forest Hart, Sculptor, SCR Corporation d/b/a Jonas Supply Company, Rayline Mannikins, Inc., Research Mannikins, Foster Taxidermy Supply, Joe Coombs Classics, Inc., Jim Allred Taxidermy Supply, Matt Thompson Taxidermy & Supply, Martin Industries, and McKenzie Sports Products, Inc. (hereinafter "Suppliers") are sculptors, creators and/or owners of original three-dimensional works known in the taxidermy profession as "forms" or "mannikins". The Suppliers have placed copyright notices on their works and have registered their creations with the United States Copyright Office.

The Suppliers are not an organized group. They are independent companies, and are competitors of one another. The common interest the Suppliers share is to see their intellectual property rights protected. To prevent infringement upon these important rights, the Suppliers have attempted to curtail the activities of, among others, the Petitioners, Dan Chase Taxidermy Supply Company, Inc. and Dan Chase (hereinafter "Petitioners"). See *Hart v. Dan Chase Taxidermy Supply Company, Inc.*, 884 F.Supp. 71 (N.D.N.Y. 1995) In addition to other cases, the decision below sanctions those rights.

The Suppliers own or create original three-dimensional works that portray, in extreme detail, the body and form of various animal species. Through research, experience and imagination, the Suppliers (or their employees) create, in a clay medium, a sculpture of a particular animal, with an original pose, attitude and aspect. Although anatomically accurate, it is the sculptor's individual style and expression that translates his or her idea into a tangible medium.

The Suppliers primarily offer their works for sale through catalogs. There are hundreds, if not thousands, of different mannikins offered for sale; even for a particular species such as the whitetail deer. The Suppliers recognize the rights of others to create their own version of such mannikins, including, for example, a whitetail deer mannikin, from scratch[1]. However, they do not condone copying of theirs or others' original works.

The National Taxidermists Association (hereinafter "NTA") is a not-for-profit organization comprised of many of the nation's professional taxidermists and related professionals. The NTA, in addition to various administrative and fiscal functions, offers guidance to its members. Part of that guidance takes the form of a Code of Ethics.

Cannon Eleven of the NTA Code reads:

> I will not cast or reproduce any form or part thereof except my own, sculpted by me or my employee(s), unless I have specific permission to do so from the originator of the form.

The NTA seeks compliance with its Code of Ethics. The NTA's Code of Ethics, and particularly Cannon Eleven, was referred to in the decision below.

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[1] Most of the Suppliers offer for sale mannikins they have each created for the same species of animal, such as a whitetail deer.

If the decision below is left undisturbed, the intellectual property rights of the Suppliers will remain undisturbed, and the NTA's Code of Ethics will be recognized. This result is in the best interests of copyright owners, taxidermists and the public. If anyone was allowed to copy the works sculpted by another, there would be no incentive to create new works.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Petition for Writ of Certiorari, as well as Petitioner's description of the Opinions Below, Statement of Jurisdiction and Statutes involved.

REASONS FOR DENYING THE WRIT

By its decision, the court below recognized the copyrightability of original three-dimensional works known as taxidermy forms. Finally, taxidermists and other taxidermy professionals had confirmation of their custom and practice of respecting the copyrights of the forms' sculptors; a practice reflected in the NTA Code of Ethics.

As set forth in the following pages, this Court's consideration of the questions presented by the Petitioner is inappropriate because:

(1) there is no conflict between the decision below and a decision of another United States court of appeals; and

(2) the decision below correctly interprets the Copyright Act.

I.
THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS OR THE COPYRIGHT ACT.

The question raised by Petitioner is whether taxidermy mannikins are copyrightable within the meaning of the Copyright Act. See 17 U.S.C. § 101. The court below properly

decided this issue, and there is no conflict with either the legislative history of the Copyright Act or another United States court of appeals.

A. The Court of Appeals' Decision Accords with other Court of Appeals Decisions.

Contrary to Petitioners' argument, no other United States circuit has conflicting case law on the specific issue decided below. The circuits that have addressed the copyrightability of taxidermy mannikins or realistic depictions of animals are the First, Second, Third and Ninth Circuits. See *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988)(concrete lawn ornaments - deer); *Hart v. Dan Chase Taxidermy Supply Company, Inc.*, 884 F.Supp. 71 (N.D.N.Y. 1995)(taxidermy mannikins)[2]; *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 671 (3d Cir. 1990)(animal nose masks); *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1507 (9th Cir. 1987)(taxidermy mannikins); *Kamar International, Inc. v. Russ Berrie and Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981)(realistic depictions of animals). The cases consistently hold that the subject matter is copyrightable.

Under the reasoning proffered by Petitioners, any painting that realistically depicted an animal, such as the works of John J. Audubon, would not be protectable under the Copyright Act. Significantly, the Act does not foreclose such.

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[2] This case was appealed to the Second Circuit Court of Appeals by Archie Phillips, Jim Allred Taxidermy Supply, and Matt Thompson Taxidermy and Supply, on the subject of the copyrightability of fish mannikins. The appeal was argued on March 21, 1996. The Court of Appeals has not yet rendered a decision.

B. The Court of Appeals Decision Accords with the Intent of the Copyright Act.

The Copyright Act, and the "useful article" language currently set forth at section 101, is merely a codification of this Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954). See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 54-55 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News, pp. 5659, 5668. In *Mazer*, this Court was faced with the issue of whether a lamp base that incorporated sculptured figurines was copyrightable. *Id.* In reaching its decision, the *Mazer* Court examined the question of utilitarian use of copyrighted articles. *Id* at 208. Ultimately, this Court held:

> We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law.

Id at 218.

Petitioner takes a position counter to *Mazer* and the Copyright Act. There is no dispute that Respondent's and Suppliers' works are three-dimensional sculptures. Furthermore, the sculptures, which are done in extreme detail, would be copy-

rightable if they did not perform their purported "function" as a base to hang skins upon[3]. Just as the petitioner in *Mazer* argued that the figurines lost their copyrightable status when they became a base for a lamp, Petitioner herein urges the mannikins should lose their status as sculptures because a taxidermist hangs skins on them. Such reasoning is flawed.

Petitioners' argument that a monopoly has been created is similarly misplaced. It is axiomatic that the Suppliers, all competitors with each other, and who create and offer for sale taxidermy mannikins for the same species, are not monopolizing the idea. It is not the species, the pose, or the attitude that Suppliers seek protection of, it is their individual style that separates one's version of a species, such as whitetail deer, from another's. See *Concrete Machinery Co.*, 843 F.2d 600, 607. Such a position is consistent with the underpinnings of the Copyright Act and the decision below.

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[3] This Court in *Mazer* noted, "[i]ndividual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. ... Such expression, whether meticulously delineating the model or mental image or conveying meaning by modernistic form or color, is copyrightable. ..." *Id* at 214.

CONCLUSION

For the foregoing reasons, and those articulated in Respondent's brief, we urge the Court to deny the Petition for Writ of Certiorari.

Dated: May 21, 1996

Respectfully submitted,

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